Supreme Court, U. S.
FILED
APR 10 1979
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

AUTOMOBILE CLUB OF MICHIGAN, DETROIT AUTOMOBILE INTER-INSURANCE EXCHANGE, MOTOR LAND INSURANCE and GROUP INSURANCE COMPANY OF MICHIGAN,
Petitioners

vs.

DOROTHY J. BELL, SHIRLEY J. SIMS, KATEY WEATHERSPOON, MARTHA COWAN, ANITA PRYSOCK, LILLIE YARBOROUGH, DAVID ADAMS, CHARLES HALL, DWIGHT T. SMITH, JOHNNIE GREEN, JAMES CASTELLE and HENRY SWIFT, individually and on behalf of all persons similarly situated,
Respondents,

No. 78-1542

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BODMAN, LONGLEY & DAHLING
Joseph A. Sullivan
and
Lloyd C. Fell,
Kathleen A. Lieder and
James J. Walsh
34th Floor, 100 Renaissance Center
Detroit, Michigan 48243
(313) 259-7777

THE INLAND PRESS, DETROIT, MICHIGAN

## INDEX


| | Page |
|---|---|
| Opinions below | 2 |
| Jurisdiction | 2 |
| Question presented | 2 |
| Constitutional provision and rules involved | 3 |
| Statement of the case | 3 |
| Basis for federal jurisdiction | 7 |
| Reasons for granting the writ | 8 |
| Conclusion | 15 |

Appendix

| | |
|---|---|
| Order of United States District Court | 1a |
| Order of United States Court of Appeals | 4a |
| Rules 33 and 34 of Federal Rules of Civil Procedure | 6a |
| Questionnaire | 10a |

## Authorities Cited


*Page*

**Cases:**

*Belcher* v *Bassett Furniture Industries, Inc,* 588 F2d 904 (4th Cir 1978) ..... 9, 10, 11, 12

*Detroit Edison Co.* v *NLRB,* .....US....., 47 USLW 4233 (1979) ..... 12

*Marshall* v *Barlow's, Inc,* 436 US 307 (1978) ..... 12

*NLRB* v *Babcock & Wilcox Co,* 351 US 105 (1956) ..... 14

*Parents' Committee of Public School 19* v *Community School Board,* 524 F2d 1138 (2d Cir 1975) ..... 9, 10

*Schlagenhauf* v *Holder,* 379 US 104 (1964) ..... 8, 11

*See* v *City of Seattle,* 387 US 541 (1967) ..... 12

*Sladen* v *Girltown, Inc,* 425 F2d 24 (7th Cir 1970) ..... 10, 11

**Constitutional Provisions**

US Constitution—4th Amendment ..... 3, 12

**Statutes**

28 USC §1254 ..... 2

28 USC §1281 ..... 13

28 USC §1291 ..... 7, 9

28 USC §1343 ..... 7

28 USC §1651 ..... 2

28 USC §2201 ..... 7

28 USC §2202 ..... 7

42 USC §1981 ..... 3

42 USC §2000e ..... 3





*Page*

**Rules:**

Supreme Court Rules

31 ..... 2

Federal Rules of Civil Procedure

33 ..... 3, 6, 9

34 ..... 3, 6, 9, 10, 11, 12

35 ..... 8

45 ..... 13

Federal Rules of Appellate Procedure

21(a) ..... 7

**Other Authorities:**

Hughes & Anderson, *Discovery: A Competition Between the Right of Privacy and the Right to Know,* 23 U Fla L Rev 289 (1971) ..... 11

IN THE

# Supreme Court of the United States

---

| | |
|---|---|
| **AUTOMOBILE CLUB OF MICHIGAN, DETROIT AUTOMOBILE INTER-INSURANCE EXCHANGE, MOTOR LAND INSURANCE and GROUP INSURANCE COMPANY OF MICHIGAN,**<br>**Petitioners**<br>**vs.**<br>**DOROTHY J. BELL, SHIRLEY J. SIMS, KATEY WEATHERSPOON, MARTHA COWAN, ANITA PRY-SOCK, LILLIE YARBOROUGH, DAVID ADAMS, CHARLES HALL, DWIGHT T. SMITH, JOHNNIE GREEN, JAMES CASTELLE and HENRY SWIFT, individually and on behalf of all persons similarly situated,**<br>**Respondents,** | **No. .....** |

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

---

Automobile Club of Michigan, Detroit Automobile Inter-Insurance Exchange, Motor Land Insurance and Group Insurance Company of Michigan, Petitioners herein, pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the Sixth Circuit entered in the above case on March 12, 1979.

## OPINIONS BELOW

The District Court for the Eastern District of Michigan did not issue an opinion in connection with its order requiring petitioners to assemble their employees for administration of a questionnaire devised by respondents. The order of the district court, which is printed in the Appendix at pp 1a-3a, is reported unofficially at 18 FEP Cases 970. The order of the Court of Appeals for the Sixth Circuit which dismissed petitioners' appeal from the order of the district court is not yet reported. The order of the Court of Appeals is printed in the Appendix at pp 4a-5a.

## JURISDICTION

The order of the Court of Appeals for the Sixth Circuit dismissing petitioners' appeal was entered March 12, 1979. The jurisdiction of this Court is invoked under 28 USC §1254(1). Alternatively, jurisdiction of this Court is invoked under 28 USC §1651. Petitioners hereby move, under Supreme Court Rule 31, for leave to file a petition for issuance of a Writ of Certiorari under 28 USC §1651(a).

## THE QUESTION PRESENTED

Do the Federal Rules of Civil Procedure authorize a federal district court to order, as part of pretrial discovery in an action alleging employment discrimination, a defendant to assemble 1400 of its employees on its premises during working hours, to answer a detailed two-page questionnaire which inquires into employees' living arrangements, financial affairs and other private matters and which contains a misleading introductory statement, drafted by the district court, designed to coerce employees into answering the questionnaire?



## CONSTITUTIONAL PROVISION AND RULES INVOLVED

### Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

### Federal Rules of Civil Procedure 33 and 34

The rules involved are Rules 33 and 34 of the Federal Rules of Civil Procedure. Because of the length of these provisions, their pertinent text is set forth in the Appendix at pp 6a-9a.

## STATEMENT OF THE CASE

Petitioners are a non-profit organization, a reciprocal insurance exchange and two insurance companies, all organized under the laws of Michigan. Respondents, who purport to represent black employees and applicants for employment of petitioners, filed their initial complaint against petitioners in December 1972. The complaint, which has been twice amended, asserted rights under Title VII of the Civil Rights Act of 1964 (42 USC §2000e, *et seq.*) and the Civil Rights Act of 1866 (42 USC §1981).

Respondents filed their second amended complaint on October 20, 1976. As did the two earlier complaints, the second amended complaint alleged broadly that petitioners had discriminated on the basis of race in recruitment, hiring, job assignments, promotions and other employment practices. In addition to its broad allegations of employment discrimination, the second amended complaint, as

did the two earlier complaints, alleged that the relocation of petitioners' administrative headquarters from downtown Detroit to the adjacent city of Dearborn constituted illegal employment discrimination. Paragraph 36 of the second amended complaint alleges:

> "The Defendant's relocation from Detroit, which has a substantial Black population, to Dearborn, which has virtually no Black population and to the suburban Detroit area where there is substantially smaller Black population than there is in Detroit will and does have an adverse, discriminatory impact upon Defendant's Black employees. While approximately four-fifths (4/5) of the Defendant's employees are expected to continue their employment with Defendants at the new location in Dearborn, the vast majority of the employees will not be able to continue their employment due to Defendant's move to the new location, and they are Black and in most instances are Black males. The vacancies created by the inability of Black employees to follow Defendant's move to the new location will not be filled by Blacks, but instead by Whites. Whites and not Blacks will also fill positions created by Defendant's further expansion at the new site."[1]

In February 1971, petitioners announced their plan to build a new administrative headquarters in Dearborn, on a site approximately 10 miles from their Detroit building. Respondents brought this action in December 1972. Although the initial complaint prayed for injunctive relief against the move, the matter was not pursued until March 1974. Then, with petitioners' new administrative headquarters building complete and the transfer of operations to that site underway, respondents sought a preliminary injunction from the district court. Among other things, respondents requested that the court order petitioners to pay black employees overtime pay for time spent traveling to work at the new location, not to take disciplinary action against black employees for tardiness and to provide taxi service for black employees who missed the special bus service petitioners had provided. After a hearing, the court denied the requested injunction because there was no showing of either irreparable harm or the likelihood of success on the merits.

[1] Nearly five years after the relocation of petitioners' administrative offices, petitioners' Fourth Interrogatories asked respondents to name all black employees who were unable to continue their employment because of the relocation. Respondents' answers named only four employees.



In November 1977, respondents proposed to petitioners that petitioners' employees answer a four-page questionnaire devised by respondents. To answer the questionnaire, employees would have to answer questions about transportation to work from December 1970 to the present and also provide information about their families' financial affairs. Petitioners refused to participate.

On March 28, 1978, respondents served on petitioners a pleading entitled "Request for Access to Premises to Conduct A Survey or in the Alternative Plaintiffs' Seventh Interrogatories". Attached to this pleading was a detailed two-page questionnarie which respondents proposed almost all of petitioners' employees be required to answer. The questionnaire is printed in the Appendix at pp 10a-11a. In addition to questions about transportation to work in February 1971 and on the date the employees would fill out the questionnaires, it asked employees to reveal information about living arrangements, home value or rent payments, yearly income of other persons in their households and the like. Petitioners filed objections to respondents' request,

pointing out that neither Rule 34 nor Rule 33 authorized their entry onto petitioners' premises to subject petitioners' employees to these questionnaires.

Respondents then filed with the district court a motion seeking the court's order that they be permitted to enter petitioners' premises to administer their questionnaires. A hearing on this motion was held before Judge Joiner on August 10, 1978, at which time petitioners not only presented their objections to the questionnaires, but presented expert testimony about the technical inadequacies of respondents' proposal. Judge Joiner announced from the bench his intention to require administration of respondents' questionnaires. The order permitting respondents to administer their questionnaires on petitioners' premises during working hours was entered October 20, 1978. In his order, Judge Joiner found that the information sought by respondents "may be relevant" to respondents' claim that the relocation of petitioners' administrative headquarters to Dearborn violated Title VII. The order requires that the following introductory statement be added to the questionnaire:

> "This survey is being administered at the request of the United States District Court for the purpose of helping the court understand more about the employees of the Automobile Club. No one is being ordered to answer any of the questions in the survey; each of you is free to refuse to take part. *However, for your information, if you do choose not to take part in this survey, it is possible that in the future you may be ordered by the court to present yourself for a more formalized and detailed questioning session. It is the opinion of the court that by filling out this survey, you will be doing your part in aiding the court's search for the truth at a minimum of inconvenience to yourself.*" (Emphasis supplied).



Petitioners filed a timely notice of appeal from the district court's order to the Court of Appeals for the Sixth Circuit. On January 16, 1979, respondents filed a motion to dismiss the appeal as one from an interlocutory order. Petitioners filed their brief in opposition to that motion on January 26, 1979. Petitioners requested that, if the Court of Appeals should agree with respondents and find the order non-appealable, their appeal be considered as a petition for mandamus. In order to comply with Rule 21(a) of the Federal Rules of Appellate Procedure, a copy of the brief was served on Judge Joiner.

On March 12, 1979, the Court of Appeals entered its order dismissing petitioners' appeal as one from an interlocutory order which petitioners could refuse to obey and then seek review after sanctions were imposed. The order rejected petitioners' argument that the district court's order was appealable under 28 USC §1291 as a "collateral" order and also ruled that petitioners were not entitled to review by mandamus.

Although the district court previously denied petitioners' request for a stay of its order pending their appeal to the Court of Appeals, petitioners on March 28, 1979, requested from the district court a stay pending this Court's ruling on this petition. This request was denied on April 4, 1979.

## BASIS FOR FEDERAL JURISDICTION

Respondents' Second Amended Complaint asserted jurisdiction under 28 USC §1343(1) and (4), 28 USC §2201 and 28 USC §2202.

## REASONS FOR GRANTING THE WRIT

### THIS PETITION PRESENTS A NOVEL AND IMPORTANT QUESTION OF FEDERAL PROCEDURE: HAS A DISTRICT COURT THE AUTHORITY TO IMPOSE DISCOVERY PROCEDURES NOT AUTHORIZED BY THE FEDERAL RULES OF CIVIL PROCEDURE?

In reviewing a district court order that a defendant submit to physical and mental examinations under FR Civ P 35, this Court declared in *Schlagenhauf* v *Holder*, 379 US 104, 121 (1964):

> "The Federal Rules of Civil Procedure should be liberally construed, but they should not be expanded by disregarding plainly expressed limitations."

The district court has disregarded the "plainly expressed limitations" of the rules governing pre-trial discovery and has attempted to devise a procedure wholly without precedent in American law. It has ordered petitioners to allow respondents to enter petitioners' premises and administer during business hours a questionnaire to over 1400 of petitioners' employees whom petitioners are ordered to "assemble."

*Schlagenhauf, supra,* recognized that the formulation of ultimate boundaries for discovery is an appropriate task for this Court.

> "[I]n this instance the issue concerns the construction and application of the Federal Rules of Civil Procedure. It is thus appropriate for us to determine on the merits the issues presented and to formulate the necessary guidelines in this area." 379 US 104, 112.



### A. The Decision of the Court of Appeals for the Sixth Circuit is in Conflict with a Decision of the Court of Appeals for the Second Circuit.

Respondents' motion for permission to question petitioners' employees asserted that this procedure was authorized either by Rule 33, which governs written interrogatories to a party, or by Rule 34, which governs inspection of documents or tangible things. The district court did not specify which, if any, of the rules governing discovery would sanction the entry onto a party's business premises for the purpose of questioning non-parties. The Sixth Circuit refused to review the district court's order. The Second Circuit, in *Parents' Committee of Public School 19* v *Community School Board,* 524 F2d 1138 (2d Cir 1975), held that an analogous procedure in an action alleging unequal spending of federal funds for bilingual education in public and non-public schools was not discovery authorized by Rule 33. The Second Circuit reversed the district court's order that defendant school board administer a particular language test to its pupils. Contrary to the position taken by the Sixth Circuit, the Second Circuit ruled in *Parents' Committee, supra,* that an order which, although disguised as discovery, compelled a party to follow a procedure not authorized by the Rules was appealable under 28 USC §1291 as a "collateral" order.

### B. The Decision of the Court of Appeals for the Sixth Circuit is in Conflict with Decisions of the Courts of Appeals for the Fourth and Seventh Circuits.

The Fourth Circuit recently has held that Rule 34 does not provide the basis for an order permitting a party to enter the premises of another party in order to engage in questioning of employees. In *Belcher* v *Bassett Furniture*

*Industries, Inc,* 588 F2d 904, (4th Cir 1978), the Fourth Circuit reversed a district court order permitting a Rule 34 inspection of defendant's plant because questioning of employees would occur during the inspection. The order reversed in *Belcher* at least included inspection of the plant and its operations, a procedure authorized by Rule 34. Here, respondents are not interested in inspecting petitioners' premises or operations and the order does not provide for inspection. Questioning of employees in *Belcher* was enough to taint an otherwise legitimate Rule 34 inspection. Here, we have only the taint.

Moreover, Rule 34 does not give the district court authority to order a party to participate in tests or experiments devised by another party. The Seventh Circuit, in *Sladen* v *Girltown, Inc,* 425 F2d 24 (7th Cir 1970), held that a district court was without authority in ordering a plaintiff in a products liability case to test the allegedly defective product. The court wrote:

> "Only Rule 35 of the F.R. Civ. P. gives the district court authority to order examinations and these concern the mental and physical health of a party". 425 F2d 24, 25.

The order of the district court, which the Sixth Circuit refused to review, departs farther from the discovery procedures authorized by the Rules than did the orders reversed in *Parents' Committee, supra, Belcher, supra,* and *Sladen, supra.* The order reversed in *Parents' Committee* required administration of a language test to school children. Here, the order requires that petitioners' employees be questioned, not about their jobs, but about their personal and financial affairs. The order reversed in *Belcher* was defective because it permitted questioning of employees about their jobs during an inspection. Here, the



order is concerned only with questioning, none of which relates to employment. In *Sladen,* the district court erred by ordering under Rule 34 the testing of a physical object. Here, the district court has ordered petitioners to assemble their employees to participate in respondents' experiment.

**C. The District Court's Order, by Permitting Respondents to go upon Petitioners' Premises in order to Question Petitioners' Employees about their Private Affairs, a Procedure Not Authorized by Rule 34, Violates both the Property Rights of Petitioners and the Privacy Rights of Petitioners' Employees.**

Petitioners pointed out to the district court that to allow respondents to question employees on petitioners' premises would disrupt and interfere with their normal business operations. Such disruption and interference, petitioners argued, would be caused by a procedure not authorized by Rule 34, which only authorizes entry to inspect the premises themselves or any "object" or "operation" located on the premises. Inspection authorized by Rule 34 is not interrogation, and petitioners' employees are not "objects" or "operations".

Of the Federal Rules of Civil Procedure, only Rule 34 deals with entry upon a party's premises. Until the 1970 amendments to the Rules, a showing of "good cause" was the "plainly expressed limitation on the use of that Rule", *Schlagenhauf, supra,* 379 US 104, 118. While the Rule now permits entry onto premises without an order, there is authority for the position that "good cause" still must be demonstrated before a district court can order entry over objections. *Belcher, supra,* and Hughes & Anderson, *Discovery: A Competition Between the Right of Privacy and the Right to Know,* 23 U Fla L Rev 289 (1971). As the Fourth Circuit stated in *Belcher, supra:*

> "Since entry upon a party's premises may entail greater burdens and risks than mere production of documents, a greater inquiry into the necessity for inspection would seem warranted." 588 F2d 904, 908.

"Good cause", whether implicitly or explicitly required, reflects Rule 34's accomodation of discovery needs to important property rights.

For the district court to order petitioners to permit respondents to enter their premises, for a purpose not even contemplated by Rule 34, is a serious intrusion upon property rights recognized by the Fourth Amendment. As this Court announced in *See* v *City of Seattle,* 387 US 541, 543 (1967):

> "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property."

This Court recently has reaffirmed this position in *Marshall* v *Barlow's, Inc,* 436 US 307 (1978).

An entry supported by "good cause" and for one of the purposes set forth in Rule 34, "for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon," would not constitute an unreasonable entry. When the entry is for the purpose of interrogating employees under threat of court sanctions in an experiment totally unauthorized by the discovery rules, it cannot be considered reasonable.

The district court's order also disregards petitioners' employees' interest in privacy. As this Court recognized in *Detroit Edison Co* v *NLRB,* ..... US ....., 47 US LW 4233 (1979), employees' privacy interests are worthy of



protection, even in the face of claims by employee representatives that they need confidential information.

The court's order does not directly order petitioners' employees to disclose to respondents the confidential information requested by the questionnaire. However, the introductory statement which the order requires be placed on the questionnaire is misleading and designed to coerce employees into participation. The introductory statement is coercive because it threatens petitioners' employees. If they are not "cooperative", they can be ordered by the court "to present yourself for a more formalized and detailed questioning session". The implication is they will be hauled before the court and stripped of even more of their privacy.

Employees are not told, as they easily could have been, that as non-parties they may be subpoenaed under Rule 45(d) for deposition, for which they would receive a witness and mileage fee, as provided in 28 USC §1281, and at which they could be represented by counsel who could object to improper questioning. The introduction also misleads employees by implying that if they do answer respondents' questionnaire, they will not be called for additional questioning as either deposition or trial witnesses. Neither respondents nor the court is in any position to make such representation. Additionally, the introduction incorrectly states that the survey is being administered at the request of the district court in a "search for the truth". The fact is the survey proposed is at the request of respondents in an effort to obtain monetary damages against the employer and other relief which may directly and adversely affect those answering the questionnaire. This failure even to mention respondents, taken with the fact that the survey

is to be administered on petitioners' premises during business hours, may lead employees who are aware of this litigation to think that petitioners approve of this intrusion into their private affairs.

The ability of respondents to obtain information which the district court found only "*may* be relevant" without invading petitioners' business premises and without misleading petitioners' employees about their rights emphasizes the violations of the rights to property and privacy sanctioned by the district court. In the course of over six years' massive and pervasive discovery of petitioners' records, respondents have been provided with, *inter alia,* address information for current employees of petitioners. As was done with the class notices, the questionnaires could be mailed to all employees. If this procedure were followed it would have the saving grave of not being contrary to the Rules; be properly identified as the respondents' discovery efforts—rather than the court's; and permit an uncoerced response by employees, instead of requiring from them an instant "yes" or "no", as would be the case if petitioners have to "assemble" them for respondents' convenience. The property rights of petitioners and the personal rights of its employees thus would be preserved and the discovery procedure restored to the limits fixed by the Federal Rules.

This Court, in *NLRB* v *Babcock & Wilcox Co,* 351 US 105 (1956), held that the property rights of owners would prevent union organizers from entering even non-working areas of the plant during non-working hours, if the organizers had available other means of contacting employees. An analogous situation is presented here, and petitioners are entitled to no less protection of their property rights than was accorded the employers in *Babcock & Wilcox, supra.*



Petitioners fully appreciate the normal reluctance of this Court, and even the Sixth Circuit, to concern itself with questions of discovery and trial preparation.

However, the district court's order is not a mere questionable exercise of discretion or a logical extension of some heretofore established construction of the Rules. The court's order is a new exercise of judicial power which ignores both the letter and spirit of the Rules controlling discovery.

The order in question, moreover, is not one which can await the outcome of the case if correction is needed. The injury posed to petitioners and their employees is irreparable. If petitioners do not obtain relief in this Court, they are, for all practical purposes, denied it.

Finally, while petitioners have taken pains to point out some of the difficulties and consequences of the district court's order, as it now reads, it is the concept of the order which is being attacked. The language chosen by the district court simply exacerbates a totally unauthorized act.

## CONCLUSION

For the reasons stated above, the writ should be granted.

BODMAN, LONGLEY &
DAHLING

Joseph A. Sullivan and
Lloyd C. Fell,
Kathleen A. Lieder and
James J. Walsh
34th Floor, 100 Renaissance Center
Detroit, Michigan 48243
(313) 259-7777

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DOROTHY BELL, et al.,
Plaintiffs,

v. Civil Action
AUTOMOBILE CLUB OF MICHIGAN, et al., No. 39309

Defendants.

ORDER

Plaintiffs have filed a motion to compel access to premises to conduct a survey or in the alternative answers to plaintiffs' seventh interrogatories. In this request, plaintiffs are seeking information from all (approximately 1400) of defendants' current employees, both class members and non-class members, about the different effects, if any, upon white and black employees of the relocation of defendants' administrative headquarters from downtown Detroit to the suburb of Dearborn, Michigan.

Based on the briefs, affidavits, expert testimony and oral arguments submitted to the parties, it is ordered as follows:

1. The information sought by plaintiffs may be relevant to the relocation issue in this case. The court finds the survey procedure requested by plaintiffs to be the most reasonable method of proceeding to gather this information and to be preferable to the burdens associated with an effort of trying to literally and individually interrogate each person under oath by deposition.

2. Defendants shall arrange to have employees present at a reasonable time during their working hours for the

purpose of responding to the survey and shall without cost to plaintiffs make an appropriate room available on their premises for the conducting of said survey.

3. Plaintiffs shall pay to AAA the salary and fringe benefits for the time spent by employees in connection with the survey, including that time spent in getting to and from the survey room, but not including the time spent by employees arranging for and coordinating the survey. All other costs must be borne by defendant, and defendant is entitled to no compensation for any interference with its normal operations and member and customer services caused by the survey.

4. If defendants want additional questions included in the survey, they shall work with plaintiffs towards that end, defendants then being responsible for salary and fringe benefits of employees for the appropriate portion of lost time. However, defendants are not required to ask any such questions, and their failure to do so does not preclude them from later challenging the reliability of the survey on the basis, *inter alia,* of failure to include pertinent questions. In addition, defendants may, if they wish, and at their expense, conduct surveys of their own at any time.

5. Copies of the completed survey shall be maintained and made readily available to both parties. If either party desires a protective order for the purpose of assuring privacy relative to the information obtained in this survey, the parties shall try to agree to appropriate provisions and, if they are unable to agree, shall submit proposed protective orders to the court.

6. The survey should be clarified to explain the point in time or date for which answers are being sought. For



example, "as of February 1, 1971" and "as of date of employment if hired after February 1, 1971" should be added where appropriate.

7. There is to be an introduction to the survey which will read as follows:

> "This survey is being administered at the request of the United States District Court for the purpose of helping the court understand more about the employees of the Automobile Club. No one is being ordered to answer any of the questions in the survey; each of you is free to refuse to take part. However, for your information, if you do choose not to take part in this survey, it is possible that in the future you may be ordered by the court to present yourself for a more formalized and detailed questioning session. It is the opinion of the court that by filling out this survey, you will be doing your part in aiding the court's search for the truth at a minimum of inconvenience to yourself."

8. If a protective order is obtained pursuant to paragraph 5 of this order, the effect of that order is to be included in the introduction to the survey set out above.

9. The parties are directed to cooperate in the execution of this order so that the survey may be taken in the very near future.

So ordered.

CHARLES W. JOINER
United States District Judge

Dated: October 20, 1978
Detroit, Michigan

No. 79-1070

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DOROTHY J. BELL, SHIRLEY J. SIMS, KATEY WEATHERSPOON, MARTHA COWAN, ANITA PRYSOCK, LILLIE YARBOROUGH, AFRO-AMERICAN ASSOCIATION, and FOCUS: HOPE, individually and on behalf of all persons similarly situated,

Plaintiffs-Appellees

v.

AUTOMOBILE CLUB OF MICHIGAN, DETROIT AUTOMOBILE INTER-INSURANCE EXCHANGE, MOTOR LAND INSURANCE, and GROUP INSURANCE COMPANY OF MICHIGAN,

Defendants-Appellants

ORDER

BEFORE: WEICK, CELEBREZZE and MERRITT, Circuit Judges

Upon consideration of defendants-appellants' motion to stay pending appeal, the plaintiffs-appellees' motion to dismiss the appeal and the responses and replies submitted in relation thereto,

It appearing from these documents and from the District Court record that the defendants-appellants are attempting to appeal from an interlocutory order allowing



the plaintiffs-appellees to administer a written survey to the appellants' employees; that the appellants will be able to refuse to obey the order and, consequently, prevent any potential harm which may result from administering the survey, and that they would be able to seek review of the order after sanctions are applied, and that, for this reason, the appeal is from an interlocutory order which does not fall within the "small class" of orders which are otherwise appealable under 28 U.S.C. §1291, *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); *Dow Chemical Company* v. *Taylor*, 519 F.2d 352 (1975); Cf. *In re April 1977 Grand Jury Subpoenas*, 584 F.2d 1366 (6th Cir. 1978); and,

It also appearing that the defendants-appellants have failed to show that exceptional circumstances exist in which their right to a writ of mandamus is clear and indisputable, *Dow Chemical Company* v. *Taylor, supra; In re April 1977 Grand Jury Subpoenas, supra* at 1372;

It is ORDERED that the motion to stay pending appeal be and hereby is denied because there is no threat of irreparable injury, *Hamlin Testing Laboratories, Inc.* v. *U.S. Atomic Energy Commission*, 337 F.2d 221, 222 (6th Cir. 1969); and, it is further ORDERED that the motion to dismiss this appeal be and hereby is granted due to this Court's lack of jurisdiction to entertain this appeal under Rule 9(b) 1, Rules of the Sixth Circuit.

ENTERED BY ORDER OF
THE COURT
John P. Hehman
Clerk

Federal Rules of Civil Procedure
Rule 33.
INTERROGATORIES TO PARTIES

(a) Availability; Procedures for Use. Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.

(b) Scope; Use at Trial. Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the extent permitted by the rules of evidence.



An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.

(c) Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.

As amended Dec. 27, 1946, eff. March 19, 1948; March 30, 1970, eff. July 1, 1970.

Rule 34.
PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES

(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, draw-

ings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) Procedure. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the



part shall be specified. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

(c) Persons Not Parties. This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

As amended Dec. 27, 1946, eff. March 19, 1948; March 30, 1970, eff. July 1, 1970.

NAME_____ DEPARTMENT or BRANCH _____

RACE_____ DATE OF SURVEY_____

For those people first employed at the Auto Club headquarters prior to February 1, 1971, your address at that time was:_____

For those people not employed at the Auto Club headquarters until after February 1, 1971: You first became employed at the headquarters office in (Month)_____(Year)_____, and at that time your address was:_____

I. How did you usually travel to work at that time?

A. DROVE ☐

1. Who did the vehicle belong to?
   - ☐ You (or someone in your household)
   - ☐ AAA
   - ☐ Other *Please specify:*_____
2. Did you usually drive someone else in your household to work on the way?
   - ☐ Yes ☐ No
3. If so, in what geographic area did this person work? *(Be as specific as possible):*_____

B. CAR POOL ☐

1. Were you a driver?
   - ☐ Always ☐ Sometimes ☐ Never
2. Were the other people in the car pool AAA employees?
   - ☐ Yes ☐ No
3. Did you pay money to participate? ☐ Yes ☐ No

C. PASSENGER ☐

1. Was the driver a member of your household?
   - ☐ Yes ☐ No
2. Did the driver go to work after dropping you off?
   - ☐ Yes ☐ No
3. If so, in what geographic area did he/she work? *(Be as specific as possible):*_____
4. Did you pay money for the ride? ☐ Yes ☐ No

D. BUS ☐

1. Which bus line(s) did you take?_____
2. Where did you board the bus? Near the corner of _____ and _____ (give street names)
3. How did you get to the bus stop?
   - ☐ Walked ☐ Drove ☐ Passenger
4. How long did it take you to get to the bus stop? _____ minutes.

E. OTHER ☐ *Please specify:*_____

II. Even if you didn't usually drive to work, was there usually a vehicle available if you wanted it for work?

☐ Yes ☐ No

A. If so, why didn't you usually use it?_____

III. Aside from your usual method of travelling to work, did you ever go by any other method at that time?

☐ Yes ☐ No

A. If so, how?
   - ☐ Drove ☐ Car Pool ☐ Passenger ☐ Bus ☐ Other

B. About how often did you use this second method?
   - ☐ Almost never ☐ Sometimes ☐ Almost half the time

IV. Whether you used the bus or not, at what intersection was the nearest bus stop to your place or residence?_____

A. How many blocks was this from your place of residence?_____

V. Which of the following best describes the building you lived in at that time?

- ☐ Single family home detached from any other house
- ☐ Single family home attached to one or more houses
- ☐ A building for 2 to 4 families
- ☐ A building for 5 to 9 families
- ☐ A building for 10 or more families

VI. Was your residence owned or was it rented by you or your household?

☐ Owned or being bought
- Its value was_____
- Don't know its value ☐

☐ Rented
- The monthly rent was_____
- Don't know monthly rent ☐

☐ Other
- Specify:_____

VII. Altogether, how many people lived in your household, including you?_____

A. How many were under the age of 14?_____

B. Besides yourself, how many people in your household, who were related to you, were employed at that time?_____

Please list each employed person below by giving his/her relationship to you, then fill in the other columns:

| Employed persons: Relationship to you? | Area in which he/she worked (e.g. downtown Detroit, Livonia, etc.) Be as specific as possible. | Approximate yearly income (choose one of the categories A-F below) | How did this person get to work? (Bus, Car, Walk, etc.) |
|---|---|---|---|
| 1. | | | |
| 2. | | | |
| 3. | | | |
| 4. | | | |
| | | A. less than $5000<br>B. $5000-$9999<br>C. $10,000-$11,999<br>D. $12,000-$14,999<br>E. $15,000-$19,999<br>F. $20,000 or more | |

VIII. How many automobiles did you have in your household at that time?_____

NAME_____ DEPARTMENT or BRANCH _____

RACE_____ DATE OF SURVEY_____

For those people presently employed at the Auto Club headquarters in Dearborn: Your present address is:_____

For those people not presently employed at the Auto Club headquarters: You transferred to a branch office or the Legal department in (Month)_____ (Year)_____ and at that time your address was:_____

I. How do you usually travel to work at the present time?

A. DRIVE ☐

1. Who does the vehicle belong to?
   - ☐ You (or someone in your household)
   - ☐ AAA
   - ☐ Other *Please specify:*_____
2. Do you usually drive someone else in your household to work on the way?
   - ☐ Yes ☐ No
3. If so, in what geographic area does this person work? *(Be as specific as possible):*_____

B. CAR POOL ☐

1. Are you a driver?
   - ☐ Always ☐ Sometimes ☐ Never
2. Are the other people in the car pool AAA employees?
   - ☐ Yes ☐ No
3. Do you pay money to participate? ☐ Yes ☐ No

C. PASSENGER ☐

1. Is the driver a member of your household?
   - ☐ Yes ☐ No
2. Does the driver go to work after dropping you off?
   - ☐ Yes ☐ No
3. If so, in what geographic area does he/she work? *(Be as specific as possible):*_____
4. Do you pay money for the ride? ☐ Yes ☐ No

D. BUS ☐

1. Which bus line(s) do you take?_____
2. Where do you board the bus? Near the corner of _____ and _____ (give street names)
3. How do you get to the bus stop?
   - ☐ Walk ☐ Drive ☐ Passenger
4. How long does it take you to get to the bus stop? _____ minutes.

E. OTHER ☐ *Please specify:*_____

II. If you answered the above question differently from question "I" on the other page, approximately when did you change your method of getting to work?
Month_____ Year_____

III. Even if you don't usually drive to work, is there usually a vehicle available if you want it for work?
☐ Yes ☐ No
A. If so, why don't you usually use it?_____

IV. If you answered the above question "yes" but answered "no" to question "II" on the other page, approximately when did you first have a vehicle available for driving to work if you wanted to?
Month_____ Year_____
A. What type of vehicle was it?_____
B. What was the model year of the vehicle?_____

V. Aside from your usual method of travelling to work, do you ever go by any other method?
☐ Yes ☐ No
A. If so, how?
☐ Drive ☐ Car Pool ☐ Passenger ☐ Bus ☐ Other
B. About how often do you use this second method?
☐ Almost never ☐ Sometimes ☐ Almost half the time

VI. Whether you use the bus or not, at what intersection is the nearest bus stop to your place of residence?_____
A. How many blocks is this from your place of residence?_____

VII. Which of the following best describes the building you live in at the present time?
- ☐ Single family home detached from any other house
- ☐ Single family home attached to one or more houses
- ☐ A building for 2 to 4 families
- ☐ A building for 5 to 9 families
- ☐ A building for 10 or more families

VIII. At the present time, is your residence owned or is it rented by you or your household?
☐ Owned or being bought — Its value is_____ ☐ Don't know its value
☐ Rented — The monthly rent is_____ ☐ Don't know monthly rent
☐ Other — Specify:_____

IX. Altogether, how many people live in your household, including you?_____
A. How many are under the age of 14?_____
B. Besides yourself, how many people in your household, who are related to you, are presently employed?_____
Please list each employed person below by giving his/her relationship to you, then fill in the other columns:

| Employed persons: Relationship to you? | Area in which he/she worked (e.g. downtown Detroit, Livonia, etc.) Be as specific as possible. | Approximate yearly income (choose one of the categories A-F below) | How did this person get to work? (Bus, Car, Walk, etc.) |
|---|---|---|---|
| 1. | | | |
| 2. | | | |
| 3. | | | |
| 4. | | | |
| | | A. less than $5000<br>B. $5000-$9999<br>C. $10,000-$11,999<br>D. $12,000-$14,999<br>E. $15,000-$19,999<br>F. $20,000 or more | |

X. How many automobiles do you have in your household at the present time?_____

Questionaire 11a